Yusri bin Pialmi v Public Prosecutor

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–165 OF 2009(J)
ZAKI AZMI CHEIF JUSTICE, ZULKEFLI AND ABDULL HAMID EMBONG FCJJ
14 JUNE 2010

Criminal Law — Dangerous drugs — Trafficking — Cannabis — Weight discrepancy of cannabis determined by chemist and that recovered by police created reasonable doubt on prosecution's case

Evidence — Witness — Calling of witness by defence — Whether failure to cross-examine investigating officer amounts to acceptance of witness testimony

The appellant was arrested by police for trafficking cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). An officer submitted that based on information received of drug trafficking activities in the appellant's area the officer arrested the appellant holding a plastic bag containing two slabs of compressed dried leaves. Analysis by the government chemist confirmed the slabs of compressed dried leaves were cannabis weighing 1,850.21g, although the investigating officer said the weight of the cannabis was 1,840g. The appellant argued that two persons on a motorcycle stopped the car he was in and arrested him contradicting events leading to his arrest as stated by the investigating officer. The appellant argued that the learned trial judge erred in law for his failure to invoke the application of the principle of adverse presumption accordance to s 114(g) of the Evidence Act 1950 ('Act') against the prosecution's case, and that the prosecution's failure to explain the discrepancy as to the increase in the weight of the cannabis arising from the investigating officer compared to the government chemist had created a serious doubt as to the identity of the cannabis seized from the appellant.

Held, allowing the appeal:

(1) There was no withholding or suppression of material evidence by the prosecution so as to invoke the application of s 114(g) of the Act against the prosecution's case. The investigating officer's evidence revealed the names of other members of the police raiding party. There was no concealment and there was no challenge by the defence on the evidence of the investigating officer of any ulterior motive that he might have to concoct evidence against the appellant. Failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of the witness' testimony. *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (see para 7).

(2) The discrepancy in that the weight of the cannabis as determined by the chemist exceeded the weight of the cannabis when it was first recovered by the police. This created a doubt as to the identity of the cannabis which was the subject matter of the charge the prosecution needs to prove. The prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis were the same substance the appellant was charged with trafficking. A defect with regard to the identity of the case exhibit was a serious matter; hence the appellant would succeed in his appeal (see para 11).

[Bahasa Malaysia summary

Perayu ditangkap oleh polis kerana mengedar dadah kanabis di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Pegawai berhujah bahawa berdasarkan maklumat yang diterima mengenai kegiatan pengedaran dadah di kawasan perayu pegawai tersebut menangkap perayu memegang beg plastik yang mengandungi dua ketul mampat daun-daun kering. Analisis yang dibuat oleh ahli kimia kerajaan mengesahkan ketulan mampat daun-daun kering tersebut adalah kanabis seberat 1,850.21g, walaupun pegawai penyiasat menyatakan berat kanabis tersebut adalah 1,840g. Perayu berhujah bahawa dua orang yang menunggang motosikal memberhentikan kereta yang mana dia berada di dalamnya dan menangkap dia menyangkal kejadian-kejadian yang membawa kepada penangkapannya seperti yang dinyatakan oleh pegawai penyiasat. Perayu berhujah bahawa hakim yang bijaksana tersilap dari segi undang-undang atas kegagalannya untuk membangkitkan penggunaan prinsip anggapan bertentangan mengikut s 114(g) Akta Keterangan 1950 ('Akta') terhadap kes pendakwaan, dan bahawa kegagalan pendakwaan untuk menjelaskan percanggahan terhadap peningkatan berat kanabis yang timbul daripada pegawai penyiasat berbanding dengan ahli kimia kerajaan telah membentuk keraguan serius mengenai identiti kanabis yang dirampas daripada perayu.

Diputuskan, membenarkan rayuan:

(1) Tidak terdapat penyekatan atau penahanan keterangan material oleh pendakwaan sebegitu untuk membangkitkan penggunaan s 114(g) Akta terhadap kes pendakwaan. Keterangan pegawai penyiasat telah mendedahkan nama-nama ahli-ahli kumpulan serbuan polis yang lain. Tidak terdapat penyembunyian dan tidak terdapat bantahan oleh pembelaan atas keterangan pegawai penyiasat terhadap apa-apa motif tersembunyi bahawa dia mungkin mereka-reka keterangan terhadap perayu. Kegagalan untuk pemeriksaan balas saksi terhadap bahagian penting kes ini akan menyebabkan penerimaan keterangan saksi. *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 (lihat perenggan 7).

(2) Percanggahan adalah bahawa berat kanabis seperti yang ditentukan oleh ahli kimia melebihi berat kanabis semasa ia diperolehi pertama kalinya oleh polis. Ini membentuk keraguan terhadap identiti kanabis yang mana adalah perkara tuduhan yang pihak pendakwaan perlu buktikan. Pendakwaan tidak boleh dikatakan telah membuktikan kesalahan pengedaran dadah melampaui keraguan munasabah terhadap perayu. Keraguan munasabah telah terbentuk terhadap sama ada kanabis yang diperolehi oleh polis yang dihantar kepada ahli kimia untuk analisis adalah bahan yang sama yang mana perayu dituduh mengedar dadah. Kecacatan berkaitan identiti ekshibit kes adalah perkara serius; maka perayu akan berjaya dalam rayuannya (lihat perenggan 11).]

Notes

For cases on calling of witness by defence, see 7(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2967–2969.

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191-274.

Cases referred to

PP v Mohamed Ali [1962] MLJ 257 (refd)
PP v Teh Cheng Poh [1980] 1 MLJ 251 (refd)
Tan Yew Choy v PP [2009] 6 AMR 124, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Yeong Kia Heng v Pendakwa Raya [1992] 1 MLJ 327, SC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), (2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Appeal No J-05–93 of 2007 (Court of Appeal, Putrajaya)

Shaik Saleem Shaik Adam & Co) for the appellant.
Suzana bt Atan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Zulkefli FCJ (delivering judgment of the court):

INTRODUCTION

[1] The appellant was convicted by the High Court of the offence of trafficking in 1,850.21g of cannabis under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and sentenced to death under s 39B(2) of the Act. The appellant appealed to the Court of Appeal against the decision of the High Court. The appellant's appeal to the Court of Appeal was dismissed by majority (Low Hop Bing and Azhar bin Ma'ah JJCA). Kang Hwee Gee JCA dissented.

The appellant now appeals to this court against the decision of the Court of Appeal in affirming his conviction and sentence by the High Court.

THE CASE FOR THE PROSECUTION

[2] The relevant facts of the case for the prosecution are as follows:

On 25 February 2005, at about 4pm, the arresting officer ('SP2') received information on drug trafficking activities along Jalan Besar, Taman Saujana, Johor Bahru, where a male Malay by the name of Yus would be involved between 6 and 8pm. Acting on this information, SP2 and his police party proceeded by car to the target place at about 6.30pm. They arrived there at 7pm. SP2 remained in the car which was parked by the side of the road. He kept watch, while his men took their respective position at designated places. Subsequently, SP2 spotted a male Malay who was identified as the appellant, coming out of a lane by the side of the road. The appellant was holding a plastic bag in his right hand. Apart from the appellant, no one else emerged from the road. SP2 and his men approached the appellant and detained him. When SP2 introduced himself as police, the appellant attempted to flee with his plastic bag in hand. SP2 stopped the appellant and thereafter a commotion ensued between the appellant and the police party. The appellant was then arrested by SP2 and his men. The plastic bag was found to contain two slabs of compressed dried leaves which, upon analysis by the government chemist ('SP6') was confirmed to be cannabis weighing 1,850.21g although SP4 said the weight of the cannabis was 1,840g. As will be seen this is a point in issue.

THE CASE FOR THE DEFENCE

[3] The relevant facts of the case for the defence are as follows:

According to the appellant at the time of arrest, the appellant was in a Kenari car with two other persons and not while walking as claimed by SP2. He had earlier walked out of the lane to the main road of Taman Saujana and was not carrying anything at the material time. As he was walking on the main road, a Kenari car with two persons in it stopped near him and asked where he was going. When he said he was going to the Giant Superstore the driver of the Kenari car asked him to get into the car and he got in and sat at the back seat. About 100 meters away, a motorcycle chased after the Kenari car and asked the driver to stop the car. Two men were on the motorcycle. When the Kenari car stopped, the two men opened the rear door and got into the car. They introduced themselves as police and handcuffed the appellant. The appellant was then brought to the police station. The police did not handcuff or bring the

other two men in the car to the police station.

THE APPEAL

[4] Before this court the appellant advanced two grounds of appeal which can be discerned as follows:

(a) There is a doubt as to the identity of the cannabis in view of the failure of the prosecution to explain the discrepancy as to the increase in the weight of the cannabis arising from the evidence of the investigating officer ('SP4') and the chemist ('SP6') and as such it cannot be said that the prosecution has proved the offence of trafficking beyond reasonable doubt.

(b) The learned trial judge erred in law in his failure to invoke the application of the principle of adverse presumption under s 114(g) of the Evidence Act 1950 against the prosecution's case.

[5] We shall first deal with the second ground of appeal. Learned counsel for the appellant submitted that it is the defence case that the drug was not found in the possession of the appellant. In this regard he contended that the prosecution had relied exclusively on the evidence of SP2 to prove that the appellant was in possession of the drugs but took no further steps to call other members of the police raiding party nor offered them to the defence as witnesses. For this he asked the court to invoke s 114(g) of the Evidence Act.

[6] With respect to the learned counsel for the appellant we do not agree with him. We are of the view even without the calling or offering as witnesses from amongst the other members of the police raiding party, the prosecution's case is complete with the evidence of SP2. The learned trial judge and the majority of the Court of Appeal had found SP2 to be a witness of truth. SP2 was not an interested witness, but a police officer performing his duties. He had related what he actually saw and did on that day. SP2's evidence is credible and ought to be believed (see the cases of *Public Prosecutor v Mohamed Ali* [1962] MLJ 257 and *Public Prosecutor v Teh Cheng Poh* [1980] 1 MLJ 251).

[7] We also find there is no withholding or suppression of material evidence by the prosecution so as to invoke the application of s 114(g) of the Evidence Act against the prosecution's case. In fact SP2's evidence has revealed the names of the other members of the police raiding party. There was no concealment whatsoever. It is also to be noted that there is no challenge by the defence on the

evidence of SP2 of any ulterior motive that he might have to concoct evidence against the appellant. On this point there is a principle of law which states that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony (see the case of *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). We therefore hold there is no merit in the arguments of learned counsel for the appellant on this ground.

[8] We shall now deal with the first ground of appeal. We find there is merit in the arguments advanced by learned counsel for the appellant. We agree with the contention of the appellant that there is a serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. According to the chemist ('SP6') the total weight of the cannabis contained in the two packages G1 and G2 is 1,850.21g. However, the investigating officer (SP4) in his evidence stated that he weighed the cannabis in the two packages G1 and G2 and found the total weight to be 1,840g. This would mean by the time the cannabis reached the hands of the chemist there had been an increase in the weight of that cannabis by 10.21g. With regard to this discrepancy in the weight of the cannabis there was no explanation given by SP4 or any other witnesses called by the prosecution to justify the increase in the weight. There is no evidence adduced by the prosecution to show that the weighing scale used to weigh the cannabis has not been calibrated and therefore inaccurate. It is also to be noted that SP4 in his evidence did not explain the movement of the cannabis in packages G1 and G2 from the time he received and weighed them on 25 February 2005 until he placed them in a box marked 'CL' (exh P3) on 27 February 2005 and sent to the chemist on 28 February 2005. It is our judgment evaluating the prosecution's case in the light of the evidence available there exists a serious doubt as to the identity of the cannabis as a case exhibit. Was it the same item that was seized by SP2?

[9] We have noted the learned trial judge's response to this discrepancy in the difference in the weight of the cannabis where he stated as follows:

> The discrepancy as to the difference in the weight of the drugs arising from the evidence of the investigating officer (SP4) and the chemist (SP6) is slight and is not fatal to the prosecution case. There is not the slightest doubt in my mind as to the identity of the drugs found and the drugs analysed and produced in court – there is no break in the chain of exhibits. In any event the slight difference in the weight is still within s 39(1)(a) of the ADB (see p 47 of the appeal record Vol 2).

[10] With respect we could not agree with the above reasoning given by the learned trial judge. We are of the view if we were to accept the reasons given by the learned trial judge as representing the correct law, it means that the identity

of the exhibit when it is first recovered is immaterial as ultimately what is important is the weight of the cannabis as determined by the chemist and that the weight is still within the minimum weight of 200g to attract the statutory presumption of trafficking under s 37(da) of the Act. In the present case, the appellant has shown there is a discrepancy in that the weight of the cannabis as determined by the chemist exceeded the weight of the cannabis when they were first recovered by the police. This in turn resulted in creating a doubt as to the identity of the cannabis, now the subject matter of the charge. It is trite that this is an element of the offence which the prosecution needs to prove. It will therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance the appellant is charged with trafficking. This court had in fact earlier decided on this same issue in the case of *Tan Yew Choy v Public Prosecutor* [2009] 6 AMR 124 wherein it allowed the appeal of the appellant against conviction and sentence in respect of trafficking on the ground that there was a discrepancy in that the nett weight as determined by the chemist exceeded the gross weight of the cannabis when it was first recovered by the police.

[11] We would like to categorically state here that the evidence adduced by the prosecution in the present case showed there is a reasonable defect in the identity of the case exhibit which is the subject matter of the prosecution against the appellant. In a criminal trial an accused person is permitted to take every available opportunity to reveal any defect in the prosecution's case (see the case of *Yeong Kia Heng v Pendakwa Raya* [1992] 1 MLJ 327). A defect with regard to the identity of the case exhibit in the present case to us is a serious matter. On this ground alone the appellant would succeed in his appeal.

CONCLUSION

[12] For the reasons above stated we would allow this appeal. The conviction and sentence recorded by the learned trial judge in respect of the charge of trafficking against the appellant is hereby set aside. The appellant is accordingly acquitted and discharged.

Appeal allowed.

Reported by Mashrifah Ravendran